

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

In Re: Pork Antitrust
Litigation

)
) File No. 21MD1776
) (JRT/JFD)
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) Minneapolis, Minnesota
) June 28, 2023
) 10:12 A.M.
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BEFORE THE HONORABLE JUDGE JOHN R. TUNHEIM

UNITED STATES DISTRICT COURT JUDGE

(JOINT MOTION TO DISMISS DIRECT-ACTION PLAINTIFFS' CLAIM)

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10:12 A.M.

(In open court.)

THE COURT: You may be seated. Good morning, everyone.

All right. Good to see you all today.

This is Multi District Litigation Number 21-2998, In re: Pork Antitrust Litigation.

We have the joint defense motion to dismiss the Direct Action Plaintiffs' consolidated complaint. So let's -- the Court has read the briefs. I think we've got, well, let's have whoever is intending to speak note their appearances for me this morning first.

Okay?

MR. ROBISON: Good morning, Your Honor. Brian Robison here representing Smithfield Foods.

I will be arguing part of the motion to dismiss for the defense group.

THE COURT: All right.

MR. TAYLOR: Jarod Taylor for the Tyson defendants.

I will be arguing for all defendants on the other parts of the motion to dismiss.

THE COURT: All right. Excellent.

MR. RANDALL: Good morning, Your Honor. Samuel

1 Randall on behalf of the Kroger DAPs, and I will be arguing
2 on behalf of all DAPs today.

3 MR. KAPLAN: Robert Kaplan. I am liaison counsel
4 for the DAPs.

5 But Mr. Randall is going to argue.

6 THE COURT: All right. Good morning to you, and
7 good morning to everybody else.

8 All right. Let us proceed. Are you going to
9 start first, Mr. Robison?

10 MR. ROBISON: I am, Your Honor. Your Honor, I
11 will be addressing the statute of limitations and the
12 fraudulent concealment issue.

13 Your Honor, the DAPs have alleged a widely
14 publicized conspiracy. Like all the plaintiffs before
15 them, they rely on four categories of public facts that
16 they say state a conspiracy claim.

17 Number one, earnings calls. The DAPs rely
18 heavily on calls with Wall Street analysts and others where
19 they say the participants in the conspiracy described in
20 detail how they were reducing supply, communicating with
21 each other about reducing supply and also sharing
22 confidential information.

23 Second category is Agri Stats. The DAPs quote
24 extensively from Agri Stats public presentations and
25 marketing materials where the DAPs say that Agri Stats was

1 freely telling everybody in the audience how their
2 operations work, how their reports work and how their
3 reports could be used to raise price.

4 Number three, the DAPs, like all the plaintiffs
5 before them, rely heavily on newspaper articles and
6 magazine articles. They relay what happened at trade
7 association meetings and how the defendants were supposedly
8 implementing the conspiracy by not running a second shift
9 or not running a plant at full capacity.

10 Fourth category relates to pricing data.
11 According to the DAPs' complaint, they say the conspiracy
12 worked, and the abnormal pricing increases were reflected
13 in public data circulated by multiple government agencies.

14 Now, we disagree with the idea there was a
15 conspiracy. I think the Court understands that today we're
16 not here to fight about that. We'll fight about whether
17 there was a conspiracy when we get to summary judgment, but
18 for today's purposes we have to take these public facts the
19 DAPs have alleged as true and assume they state a
20 conspiracy claim the way the DAPs claim.

21 Now, this is the same conspiracy the Court faced
22 a few years ago when it first considered fraudulent
23 concealment, and back then, the Court's common sense
24 decision was that it's really tough to reconcile all these
25 public facts I just ran through with the idea that this

1 conspiracy was somehow secret, was somehow concealed.

2 So after the Court rejected fraudulent
3 concealment a few years ago, the class plaintiffs abided by
4 that ruling. For years the class's cases have moved
5 forward on the basis of a four-year damages period. That
6 was true with class certification experts, class
7 certification briefing, class certification hearing, Your
8 Honor's class certification ruling.

9 And now just two weeks ago the classes served
10 expert reports for the merits phase that also had a
11 four-year damages period.

12 The DAPs are not satisfied with a four-year
13 damages period. They are seeking to reach back in time to
14 '08 or '09 with a nine- or ten-year damages period at least
15 to make these enormous cases even larger.

16 THE COURT: Doesn't the complaint allege a lot
17 more nonpublic, secret, concealed information than the
18 earlier class complaint?

19 MR. ROBISON: Your Honor, I think what the new
20 complaint alleges is more examples of exactly what the
21 class complaint alleged, and I've got some slides I will
22 work through, but just kind of at a high level, the class
23 complaints all alleged secret meetings, surreptitious means
24 of communication.

25 THE COURT: Without that much detail.

1 MR. ROBISON: True. They didn't have the dates
2 of the e-mails. They didn't have the dates of the
3 meetings, that sort of thing, but under the law, a
4 communication between one conspirator and another
5 conspirator is not concealment.

6 In any conspiracy, we would expect conspirators
7 to be talking to each other. So under the law, like the
8 *Milk* case, the *Wholesale Grocery* case, the other cases we
9 have cited, communications between conspirators does not
10 constitute fraudulent concealment. Conspirators you would
11 think would always be talking to each other about their
12 conspiracy.

13 Another category that the class plaintiffs
14 alleged was pretextual statements. The DAPs are relying on
15 the same pretextual statements. They filed some other
16 examples, but under the law, pretextual statements are not
17 fraudulent concealment.

18 That's the *Milk* case. That's the *Pocahontas* case
19 that *Milk* relies on. *Wholesale Grocery* is another one.
20 These cases say you would never expect somebody in a
21 conspiracy to freely admit they were in a conspiracy, so we
22 are not going to consider pretextual statements as proof of
23 concealment.

24 So what they have added is, the who, what, where,
25 when to some allegations, but those allegations are not

1 fraudulent concealment. So adding more detail to
2 allegations that are not fraudulent concealment doesn't get
3 them to concealment.

4 Now, I've got some slides I can hand out now that
5 would, I think would kind of illustrate some of the things
6 we are talking about. We exchanged these slides last
7 night. Both sides have them.

8 THE COURT: All right.

9 MR. ROBISON: Your Honor, the first slide repeats
10 one of the quotes from the Court's prior opinion. That
11 really is crucial here because the DAPs have cases that
12 talk about fraudulent concealment, but they don't have a
13 case where the Court found fraudulent concealment with the
14 kind of public facts we have here.

15 *Monosodium Glutamate* didn't have public facts
16 like we have here. So I think the Court's comment in its
17 first opinion is crucial to keep in mind here. The class
18 plaintiffs had all the same facts, all these same public
19 facts, that the DAPs are relying on to state a conspiracy
20 claim.

21 So all these facts that are used to get past
22 *Twombly* come back to haunt them when they then come back
23 and try to say the conspiracy was concealed.

24 Slide 3 goes through in a little more detail, and
25 it shows you exactly how the DAPs are relying on these

1 public statements. The earnings calls lay out in detail
2 how the supply cuts were supposedly coordinated, how one
3 defendant said I'm doing my part. Everybody else has to
4 chip in.

5 These sorts of things are out in the open in the
6 public. Trade association meetings, again, they're
7 reported publicly in newspaper articles. Agri Stats,
8 according to the DAPs, is showing samples of its reports,
9 Power Point slides explaining how the reports are made, how
10 audits are done.

11 Again, this is all public, and then the DAPs say
12 their conspiracy worked, and there is an increase in price
13 that is abnormal. And the proof of that they put in the
14 complaint are charts from the USDA or the Bureau of Labor
15 statistics showing this.

16 So then you've got the participants, the
17 mechanism, the monitoring service, Agri Stats, and the
18 price impact. This is all that they needed to state a
19 conspiracy claim before discovery, which is why certain
20 DAPs and the class plaintiffs did so.

21 Now, their answer to all of this is fraudulent
22 concealment. We don't, don't need to spend a lot of time
23 on slide 4. It just alleges the elements they have to
24 allege. They have to allege facts for each, and failure to
25 allege fact on any of them fails, means that they failed

1 fraudulent concealment.

2 And then the first element, the acts of
3 concealment have to be separate from the conspiracy
4 themselves, separate and apart or over and above. The
5 language is different, but the concept in the *Ripplinger*
6 case, the *Milk* case and the other cases is the same, that
7 you can't rely on conspiracy acts or conspiracy
8 communications to show fraudulent concealment.

9 So if we go to slide 5, we see again the Court
10 goes through the fraudulent concealment allegations before,
11 secret meetings, surreptitious means of communication,
12 being careful in drafting e-mails, exchanges through Agri
13 Stats, not confessing to a conspiracy and coming up with
14 pretextual statements, and the DAPs allege the exact same
15 kinds of concealment.

16 So if we go to the next slide, slide 6, this I
17 think answers Your Honor's question. It's true for sure
18 the DAPs now have more details on dates. No doubt about
19 it. The problem for them is, they have more details on
20 dates for communications that are still not fraudulent
21 concealment.

22 So the first category, meetings and surreptitious
23 means of communication, first these are not separate from
24 the conspiracy. These are not actions that are solely
25 designed to conceal the conspiracy, so they failed the

1 *Ripllinger* test.

2 But beyond that, we have five cases in our brief,
3 the *Milk* case, *Premium Products*, *Litovich*, *RX.com* and *SD3*
4 that say simply having conspirators talk to each other or
5 have meetings is neither fraudulent nor concealment.
6 That's just part and parcel of a conspiracy. So that's not
7 concealment.

8 Having a meeting where the DAPs are not invited
9 is not concealment.

10 THE COURT: So reading through the class
11 complaint, it seemed, and I believe put in the order as
12 well, that the heart of the complaint was all the public
13 statements that led to the alleged conspiracy on prices.

14 This time it seems a little different. It seems
15 like the heart of the complaint is much more focused on
16 concealment issues.

17 Why am I incorrect about that?

18 MR. ROBISON: Your Honor, I think if we're
19 talking about the conspiracy itself, it's the same
20 conspiracy. It's a conspiracy to reduce the supply of pork
21 in the U. S. somehow, either by reducing hogs or reducing
22 plant capacity or increasing exports.

23 THE COURT: The issue, you know, that we're
24 looking at is whether there is fraudulent concealment, and
25 the class complaint really didn't get too deeply into the

1 who, what, when, where, why allegations. It just was a
2 little bit more of a broad brush.

3 There is much more here, and it seems like it's
4 more of a focus on the concealment, rather than on the
5 sharing public statements that might lead to price fixing.

6 MR. ROBISON: Again, Your Honor, I think the DAPs
7 for sure have added details. They have added dates. They
8 have added names of people. They've got quotes from
9 e-mails.

10 THE COURT: But not enough in your view?

11 MR. ROBISON: The quotes in the e-mails or the
12 meetings are not concealment. It's not something
13 specifically designed to throw the DAPs off and keep them
14 from suing.

15 THE COURT: What about all the allegations about
16 e-mails that keep this confidential or destroy this after
17 reading, those kinds of references?

18 MR. ROBISON: Yep. Your Honor, that is new.
19 That is new. That is new. Slide 8 covers that. That's
20 the one piece of the complaint on concealment that I would
21 concede is new.

22 It's not concealment, though. Again the cases we
23 cite, *Premium Products* talks about this. In that case the
24 plaintiffs sued, lost on fraudulent concealment, and one of
25 its arguments on appeal was, wait a minute, I didn't know

1 they had all these internal e-mails that would have
2 supported my case.

3 And the Court said, no, you're not entitled to
4 internal e-mails. The DAPs were never going to see
5 internal e-mails from these defendants. So as far as this
6 idea of destroying evidence, first off, nothing was
7 destroyed because the DAPs have the e-mails. That's how
8 they can tell you about them.

9 So number one, there was no destruction of
10 e-mails. Number two, even if somebody sends an e-mail and
11 says please delete, that didn't conceal anything from the
12 DAPs. These were internal e-mails within a company. The
13 DAPs never knew about them. The DAPs were never going to
14 see these e-mails.

15 So whether they're preserved, whether they are
16 printed and put on a desk or whether they're deleted or
17 attempting to delete them has no bearing on the DAPs and
18 whether they can sue. They're not an internal e-mail
19 monitoring system for Tyson or Smithfield or anybody else.

20 So they're never seeing internal e-mails. They
21 would have no way of knowing whether they're preserved or
22 deleted. So when somebody says please delete, that doesn't
23 conceal anything from anybody outside the company.

24 You know, maybe the compliance department would
25 have a problem if they're monitoring people's e-mails, but

1 the DAPs are not. They're never going to have access to
2 these e-mails. They would have no idea whether they are
3 preserved or deleted.

4 So if we flip back real quick to slide 6, I think
5 we will see what we're talking about again. The second
6 bullet point about using code names, the DAPs found one
7 e-mail where one defendant supposedly referred to Walmart
8 by W, and they say this is a code, and they're speaking in
9 code.

10 Not much of a code, but again, it's an internal
11 e-mail that the DAPs were never going to see. So using W
12 as a code for Walmart inside a company doesn't fool the
13 DAPs because they never saw it. So it didn't fraudulently
14 induce them to not filing a lawsuit. They never saw it.

15 The next bullet point, exchanging information
16 through Agri Stats, again this is just communications
17 within the conspiracy. So this can't be fraudulent
18 concealment under the *Milk* case and the other cases we
19 cited.

20 And the last two are kind of similar, not
21 confessing to a conspiracy and coming up with pretextual
22 statements, we list I think seven cases that say you would
23 never expect anybody to just confess to a conspiracy if
24 they're in it.

25 So being silent or not disclosing is not

1 concealment. That's *Ripplinger* from the Eighth Circuit.
2 That is *Milk*, *Wholesale Grocery* and a whole host of other
3 cases. And then the pretextual statements, same thing.

4 Your Honor was right when it ruled earlier that
5 these statements are not fraudulent concealment. That's
6 what *Milk* says. That's what *Wholesale Grocery* says. *SD3*
7 is another one.

8 So if you look at slide 7, we have more details
9 about what you saw in the class complaints. This is all
10 repeats. This is all old news, but the details, the who,
11 what, when, where and why might match up with Rule 9(b),
12 but substantively these are not concealment allegations.

13 So I've gone through the one new allegation about
14 destruction of e-mails. The last thing I would mention,
15 Your Honor, is on the last slide, and that's due diligence.
16 That's the third element that needs to be alleged, and
17 there are literally no facts in this lengthy complaint.

18 It is more than 400 paragraphs, no facts from any
19 DAP as to how they exercised any diligence. We have all
20 these earnings calls, all these newspaper articles, all
21 these Agri Stats presentations, all these USDA pricing
22 charts coming out.

23 And nobody asked a question. Not one DAP said I
24 picked up the phone and called a defendant to ask what was
25 going on. Not one DAP said here is what a defendant said

1 to me that threw me off and made me think I didn't have a
2 case.

3 All they say is boilerplate, we exercised due
4 diligence. Then they say we asked our supplier for bids.
5 Calling somebody and saying what is your price for bacon or
6 what is your price for ham is not due diligence.

7 So, again, when we look at the *Wholesale Grocery*
8 case or *RX.com* case that we cite in our brief, just typing
9 the words "due diligence" into a complaint doesn't satisfy
10 the pleading standard. There is nothing in here about
11 questions asked. Nothing in here about answers given that
12 were false.

13 So I think on both the affirmative acts of
14 concealment, they fail again. They have a whole bunch more
15 detail of things that are not fraudulent concealment under
16 the case law, and then again, we have got sophisticated
17 buyers here with procurement departments, in-house lawyers,
18 et cetera, who apparently didn't do any investigation,
19 didn't ask any questions. There is no diligence at all.

20 THE COURT: All right. Thank you, Mr. Robison.
21 Mr. Taylor?

22 MR. TAYLOR: Good morning, Your Honor.

23 THE COURT: Good morning.

24 MR. TAYLOR: Defendants seek to dismiss DAPs'
25 Packers and Stockyards Act claim in its entirety because

1 DAPs failed to allege any violation of a provision relating
2 to the purchase, sale or handling of livestock.

3 And to illustrate that deficiency, I'm going to
4 begin by highlighting the discrepancy between what DAPs
5 alleged in Count II of their complaint, which is their PSA
6 count, and what the PSA actually provides a private right
7 of action for.

8 So turning to Count II, DAPs describe how
9 defendants purportedly violated the PSA starting in
10 paragraph 465, and they allege that the defendants violated
11 the PSA in two ways there.

12 First, they allege that, quote unquote,
13 "competitively sensitive information" is an article under
14 the PSA and that defendants violated the PSA by exchanging
15 articles for the purpose and with the effect of raising
16 prices for pork, purportedly in violation of the
17 prohibition on exchanging any article, for the purpose or
18 with the effect of manipulating prices, which they describe
19 in paragraph 462D.

20 And the second way DAPs allege that defendants
21 violated the PSA is found in 467, and they say that
22 defendants, quote, "Engaged in other conduct, including
23 without limitation, communicating and otherwise
24 coordinating with each other to restrict pork production."

25 So notice the focus of those allegation, sending

1 articles to manipulate the price of pork, communicating
2 about production of pork. Not a word about any conduct
3 relating to livestock there, and that's --

4 THE COURT: So really the question here boils
5 down to whether we're talking about or whether livestock is
6 the same as meat products or whether it's a different,
7 different category, correct?

8 MR. TAYLOR: I agree that is an important
9 question, and we addressed that in our brief.

10 Meat products are defined separately from
11 livestock. Livestock is defined as the whole animal, and
12 meat products are defined as edible. So really they're
13 mutually exclusive.

14 THE COURT: The PSA has a direct action clause
15 for just livestock, correct?

16 MR. TAYLOR: Yes, Your Honor. And so the reason
17 we see all of these allegations about a meat product
18 instead of livestock is because DAPs allege, they claim in
19 paragraph 470 that the private right of action, "Provides
20 that if any person subject to the PSA violates any
21 provisions of the PSA then that person shall be liable to
22 the person injured."

23 But DAPs got the private right of action all
24 wrong. That's not what it says. As Your Honor noted, it's
25 limited to livestock, and I believe in fact there was no

1 private right of action originally. It has accreted over
2 time to add private rights of action for certain violations
3 over time.

4 And since 1976, there has been this provision for
5 violations of any provision relating to purchase, sale or
6 handling of livestock. And it's not just relating to
7 livestock. It's relating to the purchase, sale or handling
8 of livestock.

9 And the DAPs conspicuously avoid giving any
10 response to the legislative history that we provided as an
11 attachment in our memorandum because that legislative
12 history makes clear that this provision was designed to
13 address direct transactions in livestock. It was to
14 protect the farmers from the packers who had a lot more
15 buying power than the farmers did.

16 So DAPs were forced to pivot in their opposition
17 from this focus on articles or communications about pork to
18 try to fit the square peg of a conspiracy to limit pork
19 production into the round hole of a statute about
20 livestock.

21 But what they never do is identify a provision of
22 the PSA relating to the purchase, sale or handling of
23 livestock that defendants purportedly violated.

24 THE COURT: You don't think too much of the dead
25 livestock argument.

1 MR. TAYLOR: I don't, Your Honor. In my notes
2 right here, I have a bullet on that, but I literally wrote
3 "skip" next to it because to me, they're defined mutually
4 exclusively.

5 I don't think you can say that there is a cause
6 of action for pork because pork is a dead livestock. That
7 would render this limitation a complete nullity, right?
8 Anyone who had any dealing in meat would automatically have
9 a private right of action, and that's not what was intended
10 under the legislative history, and it's not what it states
11 in the language itself.

12 But they do, DAPs do argue in their opposition
13 now, and I'm sure they will argue in a few moments, that
14 the conspiracy does include the reduction of swine, but
15 notice how they try to ally the precise language of the
16 private right of action to DAPs.

17 Anyone who does something wrong that vaguely
18 impacts livestock in any way, whether directly or
19 indirectly, in whole or in part, provides a private right
20 of action, but again, that's not what the language says.
21 The language is very precise.

22 Reducing a defendant's own sow herd isn't a
23 purchase. It's not a sale. It's not the type of
24 commercial transaction that handling seems to be referring
25 to in this statute, especially when you look at it in

1 context and you look at that legislative history again.

2 So the case here is a bad fit. Again, this is a
3 pork conspiracy that is affected by a number of mechanisms,
4 including, for example, exports. That doesn't involve the
5 purchase or sale or any type of touching livestock at all.
6 That's your processed meat products.

7 And it's not going to be possible to disentangle
8 damages from the overall pork conspiracy with damages from
9 one sale here or one purchase here or one reduction here,
10 even if they had alleged specific purchases or sales, which
11 they do not.

12 So in conclusion, the retailers, downstream
13 retailers' purchases of pork products are outside the zone
14 of interest that were intended to be protected by the PSA's
15 private right of action, which is why there has never been
16 a case holding that someone in DAPs' position could assert
17 such a claim.

18 So I'll pause for questions from the Court here
19 before I move on to the portion of the motion on the
20 product scope.

21 THE COURT: You can move on.

22 MR. TAYLOR: Okay. So defendants seek to dismiss
23 two categories of products from DAPs' complaint. One,
24 multi-ingredient products, like mixed-meat franks,
25 sandwiches, burritos, pizzas, and I'll stop the list there.

1 And secondly, byproducts like blood and bone
2 meal, and this motion is prompted by certain DAPs' motion
3 to compel structured data filed in September relating to
4 these products, yes, even burritos. DAPs in their
5 opposition did not like our reference to burritos, but they
6 sought structured data on it, and we assumed then that they
7 were including that within their complaint, and that's why
8 we're seeking to dismiss that as well.

9 In this courthouse here is a lot of sophisticated
10 legal argument based on important policy considerations and
11 complex economics, but some circumstances, I would submit,
12 call for just common sense, and I would submit this is one
13 of those circumstances.

14 This case has always been about pork meat. All
15 the nonconclusory allegations in the complaint are about
16 pork meat. Lots of comments about shoulders, ribs,
17 et cetera. It has never been about bone meal or pet food.

18 And DAPs in their opposition rely heavily on
19 their definition of pork to say, well, we say right here
20 that pork does include bone meal, but that's not a
21 nonconclusory factual allegation, and referring to it just
22 begs the question. It doesn't answer the question.

23 There are no factual allegations anywhere in the
24 complaint about products like bone meal and/or blood and
25 the like or about the market for pork products once they go

1 downstream and get into a pizza or a multi-meat hot dog or
2 something like that.

3 And to be clear, defendants do not seek to
4 dismiss, on this motion, to dismiss products with a di
5 minimus amount of other ingredients. So the glaze on a
6 smoked ham or something like that is not what we're talking
7 about. We're talking about products where the primary
8 ingredient is not pork.

9 Defendants rely on two arguments to defend their
10 lack of allegations about those types of products. First,
11 they claim in their opposition, they don't allege it, but
12 they claim that products like bone meal comes from hogs,
13 and if you're reducing hogs, the price of everything from
14 the hog is going to go up.

15 But that's actually not a given from an economic
16 basis, and DAPs' allegations don't support it. So to take,
17 reiterate one example we gave in our complaint, there is no
18 reason to assume that bone meal from pigs are special and
19 that, you know, these defendants can even try to control
20 the supply of bone meal in the market.

21 Why can't they be substituted with bone from any
22 other animals? There is nothing about that in the
23 complaint, and DAPs fault defendants for purportedly
24 requiring heightened pleading standards, but all we're
25 asking for is some allegations, any allegations.

1 There are none in the complaint, and our point is
2 not, for example, that we think DAPs have to prove that
3 that there is limited substitution between bone meal from
4 hogs and bone meal from other animals.

5 It's that the allegations that DAPs lodge in
6 support of their conspiracy for pork products don't
7 necessarily map on to other products like bone meal,
8 et cetera.

9 THE COURT: Doesn't this start getting into
10 factual distinctions among the products, perhaps a better
11 argument for summary judgment?

12 MR. TAYLOR: So, Your Honor, I would agree with
13 that to an extent. In the abstract, defendants or excuse
14 me.

15 DAPs have a quote about not needing to define the
16 product scope with a diamond cutter, and we agree with
17 that, but that doesn't mean there are no obvious
18 boundaries. There are no, again, to reiterate, there are
19 no allegations about bone meal.

20 I think bone meal is as a matter of common sense
21 that Your Honor is entitled to rely on is facially a much
22 different product from something we all eat. All of the
23 allegations, 400 paragraphs plus of allegations full of
24 what -- how defendants view -- excuse me -- how DAPs view
25 the market for pork meat.

1 Nothing about how they view the market for
2 downstream multi-ingredient products or products like
3 blood. So I think it is fair for Your Honor to use an axe
4 here instead of a diamond cutter and make broad
5 distinctions between obviously very different products.

6 And with that, I can conclude, Your Honor,
7 subject to any questions you have.

8 THE COURT: That's fine. Thank you, Mr. Taylor.

9 All right. Mr. Randall.

10 MR. RANDALL: Thank you, Your Honor. If I can
11 approach and pass up my slides.

12 THE COURT: You may.

13 MR. RANDALL: I think Your Honor is on point that
14 there are substantial differences between the complaint
15 that we pled at the end of 2022 and the one that the class
16 plaintiffs pled without the benefit of discovery in January
17 of 2020.

18 That our complaint is almost 100 pages longer
19 than the class complaint. Admittedly, about half of the
20 additional 100 pages relate to just naming all of the
21 Direct Action Plaintiffs, but there are roughly 50 pages of
22 substance there that are not included in the class
23 complaint.

24 Now, the conspiracy we've alleged is much broader
25 than the one that the class alleged was based on public

1 statements in 2021. Again, the class did not have the
2 benefit of discovery, and so they were not able to go into
3 the detail that we have done.

4 Now, we certainly include the public statements
5 that the classes included. It would be malpractice I think
6 not to include that, I think. The Court entered a 100-page
7 order determining that certain allegations were necessary
8 to make this conspiracy legally plausible.

9 We've included those same allegations that the
10 Court relied on in finding the conspiracy plausible. We
11 have also included substantially more than that. For
12 example, we've alleged substantial detail about market
13 allocation, that, again, it was not known to the class in
14 2020.

15 It's certainly part of the same conspiracy, but
16 this was just -- we needed discovery to know about the
17 market allocation aspect of defendants' agreement, the idea
18 that the defendants were constrained by this concept of
19 fair share or slaughter market share and that they followed
20 this historical market allocation during the conspiracy.
21 It was just not known to the plaintiffs in 2020, to the
22 class plaintiffs in 2020.

23 Now, the allegations that the class included in
24 2020, they alleged on page one of the slide dec, they
25 alleged secret meetings. They allege surreptitious

1 communications, limiting explicit reference to pricing, and
2 the Agri Stats allegations.

3 The Court evaluated those allegations and
4 recognized that these are the whole allegations. We're
5 cutting and pasting these allegations from the class
6 complaint, that there was not detail to these allegations,
7 that these allegations, as I read the Court's order, could
8 constitute fraudulent concealment, but in order for them to
9 do so, Rule 9 requires the who, what, when, where and how.

10 So in contrast to the class plaintiffs, we have
11 included all of that, the who, what, when, where and how of
12 fraudulent concealment.

13 Now, just to be clear, the defendants chose to
14 bring this as a 12(b)(6) argument, so there is no dispute
15 that the traditional 12(b)(6) notice pleading generally
16 applies here subject to the heightened standard under
17 Rule 9(b) limited to the allegations of fraud.

18 Defendants are not able to go beyond the
19 complaint. The defendants, again, they chose to bring this
20 as a motion to dismiss, and so they have to live by that
21 chance -- that choice.

22 As I read Mr. Robison's or as I heard him say,
23 there is the admission that we have included the who, what,
24 when, where and how for numerous allegations in our
25 complaint. We have a specific section of our complaint

1 devoted to fraudulent concealment.

2 There are -- it's 15 pages long, 43 numbered
3 paragraphs in this section. Again, none of this
4 information was available to the class in 2020, and so the
5 allegations we've included do far more than support the
6 existence of the conspiracy.

7 Now the defendants rely -- argument is relying on
8 two points, I think. First, they need the separate and
9 apart standard to apply, but they're not even really
10 arguing for the separate and apart standard. There are
11 three potential standards for fraudulent concealment.

12 There is the self-concealing standard. Your
13 Honor in 2020 rejected the application of that standard,
14 but then there is the affirmative acts standard which most
15 courts apply, and then there is the separate and apart
16 standard, which says that you have to include acts that are
17 separate and apart from the conspiracy.

18 But the defendants ignore the two cases from this
19 circuit, from this district, where the courts have found
20 that the separate and apart standard is satisfied in
21 *Wirebound Boxes* first and then in *Monosodium Glutamate*. In
22 both of those cases, the Court applied the separate and
23 apart standard and found that it was satisfied.

24 Our allegations compare very favorably to the
25 allegations in both of those cases. It's demonstrably

1 wrong, the argument that the defendants are making, that
2 communications in furtherance of the conspiracy can't also
3 be used to satisfy the separate and apart standard.

4 Essentially all of the conduct that both
5 *Wirebound Boxes* and *Monosodium Glutamate*, both of those
6 courts relied on, were communications between the
7 defendants, but there was some aspect of the communications
8 that -- where -- or some conduct where the defendants took
9 steps beyond just communicating to, to impart a degree of
10 confidentiality or concealment.

11 So that's, again, that's what we're dealing with
12 here. Even under the separate and apart standard, again we
13 disagree that it should apply, but we meet it even if it
14 does.

15 Importantly, *Monosodium Glutamate* is a summary
16 judgment case. So again, I mean we're at the 12(b)(6)
17 stage, but even under the heightened standard of summary
18 judgment, our allegations compare very favorably to the
19 allegations in that case.

20 The slide dec at page 5 there, we have included
21 specific examples. Again, none of these allegations, and
22 these are just representative examples of what we include,
23 were available to the class in 2020. You know, the e-mail
24 from a Seaboard executive on November 23rd, 2010, again
25 providing the date, providing the person's specific name

1 and exactly what he said.

2 Now, importantly, this is demonstrative of how
3 the separate and apart standard could apply. So this is a
4 conspiracy communication, but the statement "want to keep
5 this confidential" is separate and apart from the
6 conspiracy communication itself.

7 It's not strictly necessary to the communication
8 itself, and so under the separate and apart standard, as
9 applied by courts in this district, this is the type of
10 allegation that does satisfy even that heightened standard.

11 You know, we've alleged similar examples. Again
12 with -- in every single one of these instances, the who,
13 what, when, where and how as to Tyson, as to Smithfield, as
14 to Clemens.

15 Skipping ahead to page 7 of the slide dec, we
16 have also alleged instructions to destroy. Now, I
17 appreciate the creativity of the defendants' argument on
18 this point. This is an argument for a jury, not a motion
19 to dismiss.

20 The idea that an instruction to someone to
21 destroy evidence of a conspiracy can't be used to prove
22 fraudulent concealment would turn that standard on its
23 head. No court has ever held that. The cases the
24 defendants cite do not stand for that proposition.

25 This is, and this is the type of evidence or the

1 type of allegation that goes far beyond what was available
2 to the plaintiffs in either *Wirebound Boxes* or *Monosodium*
3 *Glutamate*. The example on, I think it's page 8 of the
4 slide dec, the October 19th, 2011, exchange between Tyson
5 executives. This is, again, another example of how this
6 meets the separate and apart standard.

7 The Tyson executive, you know, again I don't need
8 to say his name, but we have identified him by name in the
9 complaint. We've identified the date of communication, how
10 it was communicated by e-mail, and specifically what he
11 said.

12 And so in addition to the conspiracy
13 communication, which essentially acknowledges the existence
14 of this fair share agreement, acknowledging that Tyson felt
15 constrained in its production decisions to go above its
16 fair share.

17 In addition to that statement, he also says, "I
18 trust you will read and delete and not repeat this."
19 That's separate and apart from the conspiracy
20 communication.

21 Now, the idea that we have all of the evidence of
22 defendants' conspiracy, we strenuously dispute that, and
23 again, these are questions of fact that can be argued to
24 the jury. The fact that the defendants included
25 instructions to each other to delete evidence certainly

1 lends itself to the conclusion that evidence was in fact
2 deleted.

3 We have found almost 15 years after the fact
4 examples that were not successfully deleted, but this
5 certainly supports the reasonable inference that evidence
6 of their conspiracy was in fact deleted. I think we're
7 fully entitled to argue that to a jury.

8 The defendants, Mr. Robison, can make the same
9 argument that he made here today, but that's to a jury.
10 It's not, it's not a legal argument at the 12(b)(6) stage.
11 Again, we've included specific allegations of pretextual
12 statements.

13 Now again, it's not the law that pretextual
14 statements cannot support fraudulent concealment. As I
15 read the Court's order and the *Milk Products* case, there is
16 something -- which we understand, that to the extent there
17 is a conspiracy, failing to own up to that conspiracy can't
18 be used to support fraudulent concealment. We understand
19 that.

20 The allegations we've made show a recognition by
21 the defendants that their public statements or their
22 statements to customers were misleading. Just as they have
23 done in this litigation, the defendants have pointed to the
24 H1N1 virus or the PED virus as a reason why supply was
25 decreasing.

1 Their internal statements reflected the
2 recognition that this wasn't really accurate, that these
3 things were out there, but the effect was minimal, and it
4 really was not having a material effect on supply.

5 And finally, the fourth category of evidence, the
6 secret meeting, again, the class plaintiffs made the
7 allegation of secret meetings. We've alleged the existence
8 of secret meetings supported by all the detail required by
9 9(b). That's the difference between what we have done and
10 what the class did in 2020.

11 So we have alleged the dates of these meetings,
12 and we have alleged specifically how these meetings were
13 used to conceal the conspiracy. So, for example, The Pork
14 Club had this no attribution rule where the people who
15 attended the meetings were not allowed to attribute
16 statements made at these meetings to the attendees.

17 Again, it provides an ideal environment for the
18 defendants to get together in what we fully acknowledge is
19 a legitimate group, a legitimate trade association, but to
20 have a forum with the air of legitimacy to conduct the
21 conspiracy and keep it secret.

22 Now, the defendants are also arguing due
23 diligence here. Again, the Court resolved this in its 2020
24 order. In the November 2020 order, the Court evaluated
25 what the class alleged and said that the class's

1 boilerplate allegation on diligence was sufficient to
2 satisfy that element.

3 We have relied on that holding in crafting the
4 consolidated complaint. Again, I don't need to belabor the
5 point. As the Court, as the Court is aware, we were
6 required to file a consolidated complaint that included --
7 you know, to get a consensus for all the DAPs that, you
8 know, in a single document.

9 To include plaintiff-specific allegations of due
10 diligence in that complaint, given the Court's prior order
11 on that, I think is directly inconsistent with the purpose
12 of requiring the consolidated complaint.

13 THE COURT: There are two dates that are used for
14 knowledge of the claims. I think the complaint says that
15 you couldn't have knowledge of the complaints prior to June
16 24th, and then there is another date, June 28th.

17 MR. RANDALL: Yeah. It's a mistake, Your Honor.
18 The operative date should be June 28th.

19 THE COURT: The 28th?

20 MR. RANDALL: That's four years back from when
21 the class filed a complaint. That's just a typo. The
22 operative date should be June 28th, 2014. Thank you.

23 So, again, the defendants haven't included any
24 argument here why the Court was wrong about the issue of
25 diligence in 2020, but it's also not true that we have

1 included literally no detail. I mean, I don't pretend that
2 we have included detail of allegations that are DAP
3 specific.

4 But as the defendants' own slide dec
5 acknowledges, we have given representative examples of the
6 types of due diligence that DAPs employed during the
7 conspiracy, which we viewed as really just kind of extra
8 credit because it wasn't required by the Court at all under
9 the Court's prior holding.

10 Quickly, under the PSA, even if the defendants
11 are right about the meat products issue, which we disagree
12 with, we have also alleged violations related to the
13 purchase of livestock and handling of livestock. So there
14 is no requirement that someone alleged violations of all
15 three of the clauses of PSA.

16 Anyone who is injured by the purchase, sale or
17 handling of livestock can bring a cause of action. The
18 defendants have made no argument that we haven't alleged
19 violations related to purchase or handling.

20 I mean, much of the complaint details the sow
21 liquidation. That plainly relates to the handling of
22 livestock. If the defendants were liquidating their sows,
23 killing their sows, for the purpose of reducing supply,
24 that is something that satisfies the PSA.

25 The same thing. We have alleged the defendants

1 used their relationships with contractual hog farmers to
2 reduce supply, to pressure -- for those defendants that
3 purchased sows to pressure their suppliers to reduce
4 supply. Again, that plainly meets the purchase standard.

5 So I don't think the Court even needs to reach
6 the issue that the defendants are raising, which we
7 disagree with, because it would undermine the purpose of
8 this private right of action.

9 If someone could not bring a claim related to the
10 purchase of meat products in an industry where most
11 defendants are fully vertically integrated, it would cut
12 off the application of the PSA entirely, which, you know,
13 the case law interpreting it says that the PSA should be
14 liberally construed.

15 And so it would undermine the purpose of the PSA
16 to put in the reading that the defendants are asking for
17 here.

18 THE COURT: I guess the question there is whether
19 that's too indirect an impact.

20 MR. RANDALL: Well --

21 THE COURT: The killing, the liquidating of sows,
22 for example.

23 MR. RANDALL: Frankly, I don't see what type of
24 handling, what handling could mean other than, you know --
25 if handling means anything, it certainly relates to how the

1 defendants managed the sows under their control when they
2 had them.

3 THE COURT: Okay.

4 MR. RANDALL: Lastly, we think the defendants are
5 just wrong about the multi-products issue. This is a
6 conspiracy to reduce the supply of pork available for sale
7 in the United States.

8 The complaint, as the defendants acknowledged
9 today, our complaint defines pork to include these
10 products. There is no issue that we've pled this in our
11 complaint, and there is really no argument.

12 We agree that common sense should apply here, and
13 common sense says, if you reduce the supply of pork, then
14 all pork sold is going to be affected, affected by that.
15 So, again, the defendants make a big deal out of burritos,
16 so let's use that which we think is an extreme example.

17 This is, it's really a damages argument that
18 they're wrapping up in a 12(b)(6) argument. The defendants
19 are fully entitled to raise this as a *Daubert* challenge as
20 a motion in limine and say that the plaintiffs, the DAPs,
21 haven't traced the conduct alleged in the conspiracy to
22 specific products.

23 To use an axe, as Mr. Taylor asked you to do,
24 would be legally inappropriate and lead to, we think,
25 bizarre results.

1 So applying this to burritos, Tyson should not be
2 able to escape liability for its conduct by wrapping pork
3 it sold in a burrito or wrapping it in a tortilla. There
4 is no principled way of applying the ruling that the courts
5 want this Court to enact. It would lead to chaos and
6 confusion.

7 There is no reason why a burrito with 49 percent
8 pork should be treated differently than a burrito with 75
9 percent pork. It would have consequences, we think, for
10 all future antitrust cases.

11 In the Beef case, if a beef burrito under
12 Mr. Taylor's definition, a beef burrito that has mostly
13 beef would be fine. A beef and cheese burrito, depends on
14 the, you know, depends on, you know, how it's prepared.

15 Then, you know, if you include eggs in that, then
16 you're getting below the 50 percent standard and it's out.
17 There is no principled way to apply this at the 12(b)(6)
18 stage of the case. This is a damages argument. The
19 defendants are fully entitled to bring this as a *Daubert*
20 challenge, and we think that's the appropriate time to
21 bring this.

22 THE COURT: All right. Thank you, Mr. Randall.

23 Mr. Robison, did you have any brief rely?

24 MR. ROBISON: Yes, Your Honor. Thank you.

25 I want to be incredibly clear that the conspiracy

1 here has not changed. The same defendants are accused
2 today of reducing the supply of pork in the U. S. somehow,
3 either through exports or reducing hogs or reducing plant
4 capacity.

5 The DAPs may have found additional documents they
6 like that they think support that conspiracy claim, but the
7 fundamental conspiracy claim has not changed. It's the
8 same conspiracy, and as I noted before, slide 3 shows you
9 how the participants were publicly identified. The
10 mechanisms for reducing supply were publicly disclosed.

11 The monitoring system, Agri Stats, publicly
12 advertised its marketing materials, and the price effect of
13 this conspiracy was reported by the government. All of
14 that is public.

15 That's all sufficient to file a case, which is
16 why certain DAPs like Winn-Dixie did file cases years ago,
17 and that's why the class actions were filed years ago.
18 They didn't have to wait to get all this discovery and all
19 these additional e-mails and all these additional examples
20 that don't matter under the law in order to file a case.

21 And that's where I think we ought to take a step
22 back and think about the fraudulent concealment doctrine at
23 a higher level. The point of this doctrine is, a plaintiff
24 that has been directly duped, there was something that was
25 directed toward a plaintiff to convince a plaintiff it

1 didn't have a case, that can be fraudulent concealment.

2 Here, we don't have that. Here, we have a public
3 conspiracy that is already out in the open. It's already
4 been disclosed, and the DAPs have never identified anything
5 directed at them that fooled them into thinking they didn't
6 have a case.

7 If you look at the pretextual statements in the
8 complaint, the DAPs don't even allege they saw them. Not
9 once did the DAPs allege somebody from Kroger or somebody
10 from Winn-Dixie or somebody from Sysco saw these pretextual
11 statements and was duped into thinking he didn't have a
12 lawsuit.

13 The internal e-mail exchanges where somebody says
14 keep this confidential or delete it, never directed at a
15 DAP. They never saw it. That didn't fool them into
16 thinking they didn't have a case. So I agree they have
17 added additional details.

18 They have added details that do not matter. They
19 flat out do not matter under the law. The DAPs have no
20 answer for the *Milk* case that says pretextual statements
21 are not fraudulent concealment. They have no answer for
22 *Wholesale Grocery* or *Litovich* or *New Prime*, the cases we
23 cite that have the publicly disclosed conspiracy.

24 Where the courts reject fraudulent concealment,
25 those courts say when you have got a public conspiracy, you

1 literally cannot have fraudulent concealment. You cannot
2 say you were fooled into thinking you did not have a case
3 when your case is in the public eye. The DAPs have no
4 answer for those cases.

5 They bring up *Monosodium Glutamate* and *Wirebound*
6 *Boxes*. I encourage the Court to read those. They are
7 entirely different here. There are no public facts alleged
8 in either case.

9 Neither one of those cases has what we have here,
10 earnings calls, Agri Stats public marketing, government
11 reports showing price effects, all these things that the
12 classes and Winn-Dixie used to get past *Twombly*, all these
13 public facts completely absent from *Wirebound* and *MSG*.
14 Simply not there.

15 Those cases also have fake bids and bid-rigging
16 and other things that are not here, but the fundamental
17 problem with those cases is, they don't have everything I
18 put on slide 3. They don't have all the public facts.

19 Again, on the destroying evidence, nothing
20 directed at the DAPs. They never saw these e-mails. They
21 never would have seen these e-mails. There is nothing in
22 the complaint alleged that somebody at Kroger decided in
23 2010 he didn't have a lawsuit because he thought Tyson was
24 deleting e-mails.

25 I mean, this is completely far afield from

1 fraudulent concealment. There is nothing here saying that
2 these DAPs were fooled into not suing earlier because of
3 what was going on internally at Tyson. The DAPs never saw
4 these e-mails. Never would have seen them.

5 They weren't doing audits, so whether they were
6 preserved, printed or deleted would have no effect on
7 whether the DAPs sued. The pretextual statements, pages
8 1022 to 1023 of the *Milk* case address this. *Wholesale*
9 *Grocery* rejects it. *SD3* is another case that rejects it.

10 These pretextual statements, they can add all the
11 detail they want, all the names and dates, and they still
12 don't amount to fraudulent concealment.

13 Meetings, they talk about The Pork Club. Pork
14 Club had a no attribution rule. This was also publicly
15 disclosed. Paragraph 204 of the complaint talks about
16 these rules at The Pork Club. It cites a 2011 Agri
17 marketing article that publicly disclosed the rules of The
18 Pork Club.

19 The rules didn't say you can't repeat what was
20 said at a meeting. It said you can't attach a name to it,
21 no attribution. So there is no confidentiality over what
22 was said there. You just don't link it back to a
23 particular person.

24 That's all that they have alleged. That's all
25 that is in the newspaper article that again is public.

1 Again, even these Pork Club rules are not secret. Even The
2 Pork Club rules were out in the public. Even The Pork Club
3 rules are in the public domain in news articles they quote
4 in the complaint.

5 So, again, that fails to show that the DAPs were
6 fooled into thinking they didn't have a case because of
7 some rule at a Pork Club meeting attended by 60 people.

8 Finally on due diligence, we apologize if we
9 misread Your Honor's prior order. It looked like to us the
10 due diligence ruling in the prior order was focused on
11 consumers. The Court repeatedly used consumers, reasonable
12 consumers, et cetera.

13 In our mind that may have been directed more at
14 the IPP plaintiffs, the consumer plaintiffs. That's not
15 what we have here. These are massive companies with
16 thousands of employees. They have got entire procurement
17 departments that negotiate price.

18 And after paragraph upon paragraph of public
19 facts, all of the talk about USDA charts showing price
20 increases, all the talk about earnings calls, all the talk
21 about what Agri Stats is doing, there is not a single fact
22 saying anything about a DAP picking up the phone and asking
23 about these price increases.

24 Nothing about a pretextual statement made to a
25 DAP. This consolidated complaint has individual

1 allegations about certain other DAPs. Certain other facts
2 are alleged about each plaintiff. They could have easily
3 added that here, and they didn't.

4 At no point in the prior complaints when the DAPs
5 were filing individual complaints, they also didn't put any
6 due diligence in there. They didn't allege anything. So
7 we think, again, under *Wholesale Grocery* and the other
8 cases we cite, just typing boilerplate words "we did due
9 diligence" is not enough. We think that fails.

10 We have got a case here that is unlike the ones
11 they are citing. We have a case here that has widespread
12 public distribution of facts. The class cases have been
13 abiding by your order with a four-year damages period.

14 We think the Court got it right the first time,
15 and we would urge the Court to make the same ruling today.

16 THE COURT: All right. Thank you, Mr. Robison.

17 Did you have anything else, Mr. Taylor?

18 MR. TAYLOR: If I may, Your Honor.

19 THE COURT: Go ahead.

20 MR. TAYLOR: A few discrete points in rebuttal.

21 With respect to whether sow liquidation is handling, the
22 word "handling" should be looked at in context with the
23 other types of activities that are listed there, sales,
24 purchases.

25 This is a transaction. It's like when a grower

1 hands over their livestock to a stockyard, the stockyard is
2 responsible for the animals. It's a third party that has
3 obligations to the grower, sells the livestock or a
4 transporter, something like that.

5 This is not an animal welfare statute or
6 something else that is about how an entity treats its own
7 livestock. If I go to a farm and I trip over their lamb or
8 whatever it is, I can't bring a claim under the PSA because
9 they didn't handle their own livestock well.

10 To the extent, to the extent there is any
11 ambiguity and to your point about whether what DAPs are
12 claiming is really too indirect of an injury, again I would
13 direct the Court to the legislative history, which is very
14 clear about the wrongs, the injuries, that this private
15 right of action was seeking to remedy, and it's quite
16 limited. It's not about downstream retailers.

17 With respect to DAPs' point about whether
18 defendants' theory would cut off their -- anyone's rights
19 under the PSA, of course it wouldn't cut off those who are
20 purchasing livestock, selling livestock or paying someone
21 to handle their livestock.

22 For other violations, it's not that there is no
23 remedy. It's that it is a different remedy. The Secretary
24 of Agriculture handles that.

25 The real risk here is not cutting off liability.

1 It's unleashing a whole new type of case under this statute
2 that was never intended to be brought under it without any
3 limiting principle.

4 So then turning to the product scope, to the
5 point about whether this is really a damages question that
6 should be argued at summary judgment or at *Daubert*, the
7 reason it is a pleading issue now is because defendants are
8 not saying it's impossible to bring a claim on downstream
9 products.

10 If Tyson is integrated and didn't sell pork
11 products and only sold burritos that it incorporated the
12 pork products into, it's not that you couldn't bring a case
13 against Tyson.

14 But you would have to make some allegations about
15 those products, about why the defendants had market power
16 for those products, et cetera, and there is none of that in
17 the complaint.

18 Thank you, Your Honor.

19 THE COURT: All right. Thank you, Mr. Taylor.

20 Thank you, Counsel, for your arguments today.

21 Excellent. I appreciate it.

22 The Court will take the motion under advisement
23 and will issue an order as quickly as possible.

24 MR. ROBISON: Thank you, Your Honor.

25 THE COURT: We will be in recess.

1 COURTROOM DEPUTY: All rise.

2 (Court was adjourned.)

3 * * *

4 I, Kristine Mousseau, certify that the foregoing
5 is a correct transcript from the record of proceedings in
6 the above-entitled matter.

7

8

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10 Certified by: s/ Kristine Mousseau, CRR-RPR
11 Kristine Mousseau, CRR-RPR

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